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20 INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

21 JOSHUA SMITH, individually and on
22 behalf of all others similarly situated,

23 Plaintiff,

v.

24 PEGATRON USA, INC., a California
25 corporation, ASROCK AMERICA, INC., a
California corporation, and FATALITY, INC.,
d/b/a Fatal1ty, Inc., a Missouri corporation,

26 Defendants.

27 Case No. 3:14-cv-01822-CRB

28 **DEFENDANTS' REPLY TO
PLAINTIFF'S OPPOSITION TO
REQUEST FOR JUDICIAL NOTICE**

Date: August 22, 2014
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Before: The Hon. Charles R. Breyer

1 Defendants Pegatron USA, Inc. (“Pegatron USA”), ASRock America, Inc. (“ASRock
2 America”) and Fatal1ty, Inc. (“Fatal1ty”) (collectively, “Defendants”) reply as follows to the
3 opposition filed by Plaintiff (ECF No. 39) (“RJN Opp.”) to Defendants’ Request for Judicial Notice
4 (ECF No. 37) (“RJN”). In the RJN Defendants are requesting the Court to take judicial notice of
5 pages from two websites, both of which websites are referenced in Plaintiff’s First Amended
6 Complaint (“FAC”): (1) the www.asrock.com website, specifically at
7 <http://www.asrock.com/index.asp>, and <http://www.asrock.com/genera/about.asp> (“ASRock Pages”),
8 attached as **EXHIBIT 1** to the RJN, and (2) the Qualcomm website, at
9 <http://www.qca.qualcomm.com/products/killer-technology> (“Qualcomm Page”), attached as
10 **EXHIBIT 2** to the RJN.

I. ARGUMENT

12 In addressing Defendants' RJN the Court should keep in mind the following two initial
13 points:

14 (1) Plaintiff does not oppose Defendants' RJD with respect to the Qualcomm Page
15 (EXHIBIT 2).¹ For this reason, the Court should grant the RJD as to the Qualcomm Page
16 (EXHIBIT 2).

17 (2) As to the ASRock Pages (**EXHIBIT 1**), such webpages are being offered for a
18 limited purpose -- to underscore the need for Plaintiff to comply with Rule 9(b), including whether
19 Plaintiff should be granted leave to amend. **EXHIBIT 1** indicates that it is at least *possible* (if not
20 likely) that the www.asrock.com website on which Plaintiff so heavily relies is not even owned or
21 hosted by any of the Defendants. As such, the ASRock Pages are relevant to Defendants' position as
22 to why Plaintiff should comply with Rule 9(b) in alleging specific facts as to the role of each
23 Defendant, facts on which support Plaintiff's "information and belief" that any of the Defendants

24 ¹ Although Plaintiff does not oppose consideration of **EXHIBIT 2**, the Qualcomm Webpage, it is
25 worth noting that his claim that the website is not “referenced by or relied upon by” the FAC is
26 wrong and mischaracterizes the allegations of his FAC. Plaintiff explicitly references Qualcomm’s
27 website as evidence that statements regarding the Killer LAN feature are somehow false and
28 misleading. *See* FAC ¶22 n. 7, 24 n. 9, & 24 n. 10. Specifically, Plaintiff alleges in the FAC:
“**nowhere** does Qualcomm state that the E2200 quintuples network performance,” citing to
Qualcomm’s website (<https://www.qca.qualcomm.com/products/killer-technology/solutions/>). By
alleging such statements are “nowhere” on Qualcomm’s site, Plaintiff **necessarily** relies on the
contents of the website as proof of his claims.

1 was involved in making any of the four advertising statements at issue and which allegedly appear
2 on the www.asrock.com website, and why facts relating to such issues are purportedly exclusively
3 within Defendants' possession and cannot be known by Plaintiff. Defendants are not requesting the
4 Court to make any factual finding in connection with the Rule 12(b)(6) motions as to which entity
5 actually owns or hosts the website at www.asrock.com; and, Defendants are not requesting judicial
6 notice in order for the Court to make such a finding.

7 **A. Plaintiff's Arguments Notwithstanding, the FAC Does Incorporate the ASRock Pages**
8 by Reference

9 Contrary to Plaintiff's contention in his RJN Opp. at 2-3, this Court may take judicial notice
10 of a website to which a plaintiff "refers extensively" or "forms the basis of the plaintiff's claim."
11 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (the court may consider a document
12 plaintiff "refers to extensively" or that "forms the basis of plaintiff's claim"); *Knievel v. ESPN*, 393
13 F.3d 1068, 1076 (9th Cir. 2005) (incorporation by reference rule applies "with equal force to internet
14 pages as it does to printed material."). By arguing that the Court is to ignore the ASRock Pages
15 Plaintiff is asking the Court to accept select portions of the website he refers to and relies upon in his
16 FAC, while omitting and ignoring portions that contradict his theory. This is exactly the type of
17 omission the law seeks to prevent. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) ("Just as a
18 reader must absorb a printed statement in the context of the media in which it appears, a computer
19 user necessarily views web pages in the context of the links through which the user accessed those
20 pages."); *In re Copper Mountain Securities Litigation*, 311 F. Supp. 2d 857, 865 (N.D. Cal. 2004) (in
21 a motion to dismiss, the court may examine a document in full when a plaintiff includes incomplete
22 or partial quotes); *see also Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1131 (N.D.
23 Cal. 2010) (plaintiffs allegation that representations about a machine's performance were in "written
24 materials, including the owner's manual" allowed the court to properly consider the terms of a one-
25 year limited warranty in those materials).

26 The FAC refers extensively to the asrock.com website in that it refers to six pages that all fall
27 under the www.asrock.com domain:

28 • www.asrock.com/microsite/Fatal1tyKiller/ (FAC ¶ 18);

1 • www.asrock.com/mb/Intel/Fatal1ty_Z87_Killer/ (FAC ¶ 18);
2 • www.asrock.com (FAC ¶¶26, 27);
3 • <http://www.asrock.com/microsite/pcie3/overview.html> (FAC ¶38);
4 • <http://www.asrock.com/microsite/fatal1ty/products.html> (FAC ¶ 49); and
5 • <http://www.asrock.com/general/buy.us.asp> (FAC ¶ 49).

6 To access these sites, a visitor would go though the main page, www.asrock.com, which merely
7 redirects U.S. visitors to www.asrock.com/index.asp--the very page Defendants offer in their request
8 for judicial notice². What is more, among the various pages Plaintiff relies on in the FAC, he cites
9 specifically to www.asrock.com (¶¶26, 27). Thus, unlike *Fraley*, Plaintiff or his counsel would
10 necessarily see ASRock Page when he visited www.asrock.com, and in order to get to the other 5
11 specific pages he references in the FAC. *Knivele v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)
12 (when plaintiffs referenced a photograph on a webpage in their complaint, the court took notice of
13 other webpages that must have been viewed in order to get to that photograph). These considerations
14 are relevant to Defendants' Rule 9(b) motions because they evidence that Plaintiff and his counsel
15 have access to numerous facts which bear on the claims that are subject to Rule (9)(b)'s
16 requirements.

17 Plaintiff's reliance on *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 794 (N.D. Cal. 2011)
18 for the contention that the ASRock Pages may not be considered by this Court because they are not
19 incorporated by reference is misplaced. Unlike the defendants in *Fraley*, Defendants are not asking
20 the Court to take judicial notice of the webpage to establish facts for purposes of the Defendants'
21 Rule 12(b)(6) motions; rather, Defendants are asking the Court to consider the ASRock Pages to
22 underscore the need to comply with Rule 9(b).

23 Plaintiff's contention that a court may grant an RJD as to a webpage *only* when there is no
24 opposition to the request is not supportable. Requests for judicial notice are governed by Fed. R.
25 Evid. 201. Under Rule 201(b) a judicial noticed fact is one not subject to *reasonable dispute* in that it

27 ² The webpage www.asrock.com requires visitors to choose their region by country in order to enter
28 the site. It is reasonable to believe that Plaintiff selected the United States, in light of the fact that all
the pages he references under www.asrock.com domain are part of the United States portion of the
site and read in English.

1 is generally known within the trial court's territorial jurisdiction, or, can be accurately and readily
2 determined from sources whose accuracy cannot presumably be questioned. And while there are
3 several cases, decided in the context of a Rule 12(b)(6), motion that hold that a Court may grant
4 judicial notice if there is no opposition, such cases should not be read to hold that a request for
5 judicial notice *must* be denied when one party chooses to oppose the request. If such were the case,
6 Fed. R. Evid. 201(e), which allows for hearings on requests for judicial notices, would have no
7 meaning. Rather, if a party opposes an RJD, the Court should merely determine whether the
8 requirements of Rule 201(b) have been met, that is, whether the judicially noticed fact is not subject
9 to a *reasonable dispute* in that it is either generally known within the territorial jurisdiction of the
10 trial court or capable of accurate and ready determination by resort to sources whose accuracy
11 cannot be reasonably questioned.

12 **B. Plaintiff's Arguments Regarding "Authenticity" Should be Rejected**

13 In the RJD Opp. at 4:14-5:11 Plaintiff contends the Court should not take judicial notice of
14 **EXHIBIT 1** because Plaintiff disputes the "authenticity" of such exhibit. Such an argument is
15 unfounded and confuses the requirements of *authenticity* with concepts of *relevance*. To satisfy the
16 requirement of authenticating an item of evidence the proponent merely needs to produce evidence
17 to support a finding that the item is what the proponent claims it is. Fed. R. Evid. 901(a). In the
18 Declaration of Tod L. Gamlen attached to the RJD Defendants set forth facts which authenticate
19 **EXHIBIT 1**, *i.e.*, evidence which is sufficient to support a finding that **EXHIBIT 1** are pages in
20 from the www.asrock.com website that were accessed on July 16, 2014. *See Perfect 10, Inc. v.*
21 *Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154-1155 (C.D. Cal. 2002). There could be no
22 reasonable dispute that the website is authentic and Plaintiff does not provide any evidence or
23 argument that **EXHIBIT 1** does not, in fact, constitute pages from the www.asrock.com website as
24 of July 16, 2014.

25 Plaintiff's arguments rather seem to be directed to whether pages from the www.asrock.com
26 website from July 16, 2014 are relevant to any of the issues in the present motion. As set forth
27 above, such pages are relevant to Defendants' motion under Rule 9(b) because, at a minimum, they
28 at least indicate that the www.asrock.com website on which Plaintiff so heavily relies, and which is

1 apparently at least one source of the four advertising statements at issue, it is not owned or hosted by
2 any of the Defendants. This consideration underscores the need for Plaintiff to comply with
3 Rule 9(b) by providing specific facts as to the role of each Defendant, the facts on which Plaintiff
4 bases his “information and belief” that any of the Defendants were involved in making any of the
5 four advertising statement at issue, and whether the facts Plaintiff needs to comply with Rule 9(b)
6 are exclusively within Defendants’ control and that Plaintiff cannot know them.

7 **II. CONCLUSION**

8 Defendants respectfully request this Court take judicial notice of the ASRock Pages, attached
9 as **EXHIBIT 1** to Defendant’s Request for Judicial Notice. Further, because Plaintiff does not
10 oppose Defendants’ request for judicial notice of the Qualcomm website, this Court may take
11 judicial notice of **EXHIBIT 2** to Defendant’s Request for Judicial Notice.

12
13 Dated: August 7, 2014

14 **BAKER & MCKENZIE LLP**

15 By: /s/ Tod L. Gamlen

16 Tod L. Gamlen

17 Attorneys for Defendants

18 PEGATRON USA, INC., ASROCK

AMERICA, INC., and FATALITY, INC., d/b/a

FATAL1TY, INC.